SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO. 1092

SAMUEL EMANUEL, INDIVIDUALLY AND AS TESTAMENTARY EXECUTOR AND RESIDUARY LEGATEE OF THE SUCCESSION OF IRMA TURNER WILSON AND MARY STEWART EMANUEL,

Appellants,

versus

HAROLD CHAPPLE, TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JOE WILSON,

Appellee.

On Appeal from the Supreme Court of Louisiana

MOTION TO DISMISS APPEAL

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Appellants,

versus

HAROLD CHAPPLE, TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JOE WILSON,

Appellee.

On Appeal from the Supreme Court of Louisiana

MOTION TO DISMISS APPEAL

Appellee in the above-entitled case moves to dismiss the appeal on the following grounds:

1. No Federal question was raised or passed on in any State Court.

2. The appeal does not present a substantial Federal question.

3. The judgment rests on an adequate non-federal basis.

STATEMENT

Joe Wilson died on September 20, 1967 (R. 9). On September 25, 1967, Samuel Emanuel filed a petition praying that a notice of the filing of an application for appointment as administrator of the Succession of Joe Wilson be sent to James Sharp, Jr., Attorney for Samuel Emanuel (R. 5-6). On September 26, 1967, on the petition of Harold Chapple, who was named testamentary executor in the will of Joe Wilson, the State District Court admitted the will of Joe Wilson to probate (R. 11-12) and confirmed Harold Chapple as testamentary executor of the Succession of Joe Wilson (R. 13). The will of Joe Wilson, in the record at page 26, is the form of a nuncupative testament under private signature, as authorized by Articles 1581 and 1582 of the Civil Code of Louisiana (Appendices "A" and "B', infra). No defect in form or a manner of execution appears in the will. On October 2, 1967, appellant Samuel Emanuel filed a motion to remove Harold Chapple as testamentary executor because of failure to give prior notice of his application for appointment

(R. 16-18). On October 4, 1967, Samuel Emanuel and Mary Stewart Emanuel filed a petition praying for the annulment of the will of Joe Wilson (R. 19-21), and on October 5, 1967, the same plaintiffs filed a supplemental petition amending their petition of October 4, 1967, to add an allegation that in his will Joe Wilson proposes to dispose of property belonging to the Succession of Irma Turner Wilson contrary to the interests of plaintiffs as plaintiffs have been made legatees under the will of Irma Turner Wilson and bequeath the property attempted to be disposed of in the will of Joe Wilson (R. 24-26). On October 11, 1967, appellee Harold Chapple filed a peremptory exception of no right or cause of action to the suit to declare the will of Joe Wilson a nullity on the ground that plaintiffs (appellants) do not allege themselves to be heirs of Joe Wilson or have a right to receive any inheritance or legacy in the Succession of Joe Wilson in the event the will should be annulled (R. 32-33). On November 6, 1967, appellee Harold Chapple filed a peremptory exception to the motion to remove Harold Chapple as testamentary executor of the Succession of Joe Wilson for similiar reasons of lack of interest in appellants to bring the proceedings (R. 37-38). On November 6, 1967, appellee Harold Chapple filed an answer to the motion to remove him as testamentary executor of the Succession of Joe Wilson (R. 39-40). On November 7, 1967, the State District Court heard both the exceptions in the case and heard the motion

to remove Harold Chapple on the merits (R. 1-2). On November 15, 1967, the State District Court, assigning written reasons for judgment (R. 50-55), sustained the exception of no cause or right of action to the petition for the nullity of the will of Joe Wilson and overruled the motion to remove Harold Chapple as testamentary executor of the Succession of Joe Wilson (R. 2). After the decision by the State District Court and on the same day of the decision, appellants Samuel Emanuel and Mary Stewart Emanuel filed a motion to amend their petition, but did not show in the motion any additional facts to be pleaded by them in the proposed amended petition (R. 41). After hearing a motion for a new trial filed by Samuel Emanuel (R. 43-44), the State District Court on November 21, 1967, overruled both the motion for new trial and motion to amend which had been filed by appellants (R. 3). On November 27, 1967, the State District Court signed a judgment rejecting the motion for the removal of Harold Chapple as testamentary executor (R. 55) and a judgment sustaining the peremptory exception of no right or cause of action to the suit for the nullity of the will of Joe Wilson (R. 56). Appellants appealed to the Court of Appeal Second Circuit of Louisiana where appellee Harold Chapple answered objecting to the judgment against Samuel Emanuel insofar as it was against him in his purported and alleged capacity as residuary legatee and testamentary executor of the

Succession of Irma Turner Wilson (R. 64-65), and the State Court of Appeal amended the judgment of the State District Court to eliminate the designation of Samuel Emanuel as testamentary executor and residuary legatee, and as amended, affirmed the judgments of the State District Court. The decision of the State Court of Appeal is reported at 210 So. 2d 602, and is quoted in full in Appendix "B" of appellants' brief in this Court. Appellants applied to the Supreme Court of Louisiana for certiorari or writ of review and the Supreme Court of Louisiana refused the writ, saying "The result is correct." The decision of the Supreme Court of Louisiana is reported at 214 So. 2d 162, and appears as Appendix "C" in appellants' brief in this Court. Appellants did not at any time in any of the three State Courts plead or argue or in any other manner raise any question arising under the Federal Constitution or Statutes. None of the opinions of the three State Courts mentions, discusses or otherwise passes upon any question arising under the Federal Constitution or Statues. In the State Courts, appellants did not challenge the validity of any State statute at any time. The sole basis for the decisions of the State Courts was a construction of State laws and application of State laws to the facts of this case.

QUESTIONS PRESENTED

1. Where appellants have not raised in the State

Court any question concerning the validity of any State statutes on the ground of the repugnancy to the Constitution, treaties or laws of the United States, and the opinions, judgements and orders of the State Courts do not mention, discuss or pass on any Federal questions, does the jurisdiction of the Supreme Court of the United States attach on appeal from a judgment of a State Court dismissing the suit of plaintiffs for lack of interest of plaintiffs to sue for the nullity of a probated will, and a judgment of a State Court refusing to remove a testamentary executor appointed by the State Court?

2. Where a State statute provides that an action be brought only by a person having a real and actual interest which he asserts, and a State Court interprets the State statute as denying to parties seeking to annul a probated will the right to attack such will unless they would benefit as heir or legatee of the deceased in the absence of such will, but the constitutional validity of the State statute is not challenged, is there a substantial Federal question involved?

3. Where the State Courts interpret State procedural statutes as authorizing the appointment and confirmation of a testamentary executor named in a will upon probate of the will and prior to notice to anyone, but the constitutional validity of the statute is not challenged, is there a substantial Federal question involved?

4. Where the judgement of the State Court appealed from is based upon reasonable interpretations of a State statute requiring that a person suing to annul a probated will have a real and actual interest, and a State statute authorizing the appointment and confirmation of a testamentary excutor upon probate of a will and prior to notice to anyone, and the judgment not involving any question under the Constitution or laws of the United States, does the judgment rest on an adequate non-federal basis?

ARGUMENT

1. NO FEDERAL QUESTION WAS RAISED OR PASSED ON IN ANY STATE COURT.

The Courts of Louisiana will inquire into the question of whether any State statute is unconstitutional as a violation of the Federal Constitution. *State v. Birdsell,* 235 La. 396, 104 So. 2d 148 (1958), Supreme Court of Louisiana. However, the courts of Louisiana follow the rule that he who urges the unconstitutionality of a law must specially plead its unconstitutionality and show specifically where it is unconstitutional; and that an argument of unconstitutionality which is not raised by the pleadings is not properly before the State Court and cannot be considered on appeal to the State appellate courts. *State v. Great Atlantic & Pacific Tea Co.,* 190 La. 925, 183 So. 219 (1938), Supreme Court of Lousiana, certiorari denied *Great Atlantic & Pacific Tea Co. v. State of Louisi-*

ana, 305 U. S. 637, 59 S. Ct. 108, 83 L. Ed. 410 (1938).

The Supreme Court of the United States has consistently ruled that before its jurisdiction can be invoked on appeal from a State court, it must appear that there were Federal questions involved which were raised in the State Courts at the proper time. Supreme Court of the United States Rules 15 1(d) and 16 1(b); *Edelman v. People of State California,* 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387 (1953); *Hulbert v. Chicago,* 202 U. S. 275, 26 S. Ct. 617, 50 L. Ed. 1026 (1906). The statute authorizing appeal to the Supreme Court of the United States, 28 U. S. Code 1257(2) requires as a basis for such appeal that there be drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision of the State court be in favor of its validity.

Appellants have not pleaded, argued, or raised in any manner the question of the validity of any State statute on the ground if its being repugnant to the Constitution treaties or laws of the United States, and there has been no ruling of any State court pertaining to such a question. The Supreme Court of the United States has also ruled that certiorari is not available for review of a State court judgment where there has been no Federal question raised or presented to the State court for decision. *Newsom v. Smyth,* 365 U. S. 604, 81 S. Ct. 774, 5 L. Ed. 2d 803

(1961); *Ellis v. Dixson,* 349 U. S. 458, 75 S. Ct. 850, 99 L. Ed. 1231 (1955); *Congress of Industrial Organizations v. McAdory,* 325 U. S. 472, 65 S. Ct. 1395, 89 L. Ed. 1741 (1945). The statute providing for writ of certiorari is 28 U. S. Code 1257(3). This case is not within the scope of that statute.

2. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

In jurisdictional statement filed in this Court, appellants attached exhibits which are not a part of the record in this case in the State Court, namely, Appendix "F", which is the judgment in the Succession of Irma Turner Wilson, Number 76,119 on the Probate Docket of the State District Court, and Appendix "H", which is the will of Irma Turner Wilson, the predeceased wife of Joe Wilson.

Also, in jurisdictional statement filed in this Court, appellants make a number of assertions which are not supported by the record in this case, namely, the following:

A. Page 4 of jurisdictional statement. That Joe Wilson died during the pendency of his proceedings wherein he attacked the will of Irma Turner Wilson. Also, that after qualifying as testamentary executor under the purported will of Joe Wilson, Harold Chapple caused himself to be substituted and appoint-

ed plaintiff in lieu of Joe Wilson in the Succession of Irma Turner Wilson, Number 76,119 on the Probate Docket of the State District Court, and continued the attack upon the will of the said Irma Turner Wilson.

B. Page 5 of jurisdictional statement. That the Trial Court had refused to qualify Samuel Emanuel as testamentary executor of the Succession of Irma Turner Wilson. Also, that appellants would inherit the property of the Succession of Irma Turner Wilson were it not for the will in these proceedings.

C. Page 6 of jurisdictional statement. That Joe Wilson claims that Irma Turner Wilson left no descendants, ascendants, collateral relations or natural child or children by her duly acknowledged and that he would inherit her estate under Civil Code Article 924. Also, that Joe Wilson seeks to declare the will of Irma Turner Wilson null and void because he would not inherit her separate estate in the absence of any such will. Also, that Joe Wilson left no ascendants, descendants, collateral relations or natural child or children duly acknowledged; and but for his will there could be no substitution of party plaintiff in the Succession of Irma Turner Wilson.

If these assertions made by appellants in jurisdictional statement in the Supreme Court of the United

States add any additional issues whatever, which is questionable, they should not be considered by the Supreme Court of the United States for the reason that this subject matter was not presented by a pleading or evidence to the State Courts and there has been no issue in this case with reference to such subject matter. Appellants should not be permitted to form new issues at this time by making such assertions. Appellee objects to appellants attaching Appendices "F" and "H" to jurisdictional statment. Appellee also objects to and does not admit the correctness of the remaining assertions and conclusions shown above which are not supported by pleadings or evidence in the record. The State Courts decided the case on the basis of the record before it. The decision of the State Court should be judged by the Supreme Court of the United States on the basis of what the Court properly had before it in proceedings in the State Court. *Carter v. People of State of Illinois,* 329 U. S. 173, 67 S. Ct. 216, 91 L. Ed. 172 (1946). Appellants did not at any time offer or request leave to plead the above assertions as pleadings in the State Courts.

None of the questions raised by appellants in jurisdictional statement is a Federal question. All are questions of interpretation of State statutes. The opinions of the State Courts show ample support for their decisions. The interpretations of the State statutes are reasonable and logical interpretations. The Supreme Court of the United

States accepts and is bound by the construction given to State statutes by the State Courts. *U. S. v. Burnison,* 339 U. S. 87, 70 S. Ct. 503, 94 L. Ed. 675 (1950); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners,* 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947).

The ruling of the State Court in this case interpreting Article 681 of the Code of Civil procedure of Louisiana (Appendix "C", infra) as requiring a party who is attacking the validity of a will to have an interest such that if the will is set aside, he will inherit in the absence of the will, is the same as similar interpretations placed upon similar statutes by the United States Court of Appeals, District of Columbia Circuit, in *Kimberland v. Kimberland,* 204 F. 2d 38 (1953); and by the California District Court of Appeal, Second District, in *Re Bily's Estate,* 96 Cal App2d 333, 215 P2d 78, 15 ALR2d 861 (1950). The decision of the State Court in this case is supported by *Succession of Vicknair,* 126 So. 2d 680 (1951), decided by the Court of Appeal of Louisiana, Fourth Circuit, and certiorari denied by the Supreme Court of Louisiana; and *Succession of Israel,* 146 So. 2d 53 (1962), decided by the Court of Appeal of Louisiana, Fourth Circuit, certiorari denied by the Supreme Court of Louisiana.

The ruling of the State Court that a testamentary executor named in the will of decedent is entitled to qualify without notice to anyone is a reasonable interpre-

tation of the statutory provisions of the Code of Civil procedure of Louisiana, adopted in 1961. Cases cited by appellants in jurisdictional statement decided prior to 1961, and not involving testamentary executors named in the will of the decedent are not applicable.

The State District Court's denial of appellants' motion for leave to amend, made by appellants after the State District Court had sustained the peremptory exception of no cause or right of action and dismissed the suit of appellants was in accordance with State law. In making the motion, appellants did not offer or indicate any intention of pleading any facts which would be additional to the facts pleaded in their original petition and in their supplemental and amended petition which had been filed. Article 934 of the Code of Civil Procedure of Louisiana, (Appendix "D", infra) effective January 1, 1961, was applied in a similar manner by the Court of Appeal of Louisiana, Fourth Circuit, in *Tripod Boats, Inc. v George Engine Co.*, 170 So. 2d 238 (1965).

There being no evidence whatever in the record to show Samuel Emanuel was qualified as testamentary executor or residuary legatee in the Succession of Irma Turner Wilson, it was entirley reasonable for the State Court of Appeal to eliminate the designation of Samuel Emanuel as having such capacities in that portion of the judgment assessing costs against him.

3. THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

As shown above, the judgment of the State Court rests entirely upon a reasonable interpretation of State statutes.

CONCLUSION

For the foregoing reasons, appellee moves that this appeal be dismissed, and that the alternate prayer of appellants that the papers submitted as a jurisdictional statement be treated as a petition for writ of certiorari be denied.

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PROOF OF SERVICE

I, Howell H. Heard, Attorney for Appellee herein, a member of the Bar of the Supreme Court of the United States, herby certify that on this the 24 day of March, 1969, I served a copy of the foregoing motion to dismiss on appellants, Samuel Emanuel and Mary Stewart Emanuel, by depositing the same in a United States post office, with first class postage prepaid, addressed to James Sharp, Jr., Attorney at Law, 105 North 23rd Street, P. O. Box 271, Monroe, Louisiana, who is counsel of record for appellants.

Howell H. Heard

HOWELL H. HEARD
Attorney for Appellee

APPENDIX "A"

Civil Code of Louisiana Article 1581

A nuncupative testament, under private signature, must be written by the testator himself, or by any other person from his dictation, or even by one of the witnesses, in presence of five witnesses residing in the place where the will is received, or of seven witnesses residing out of that place.

Or it will suffice, if, in the presence of the same number of witnesses, the testator presents the paper on which he has written his testament or caused it to be written out of their presence, declaring to them that that paper contains his last will.

APPENDIX "B"

Civil Code of Louisiana Article 1582

In either case, the testament must be read by the testator to the witnesses, or by one of the witnesses to the rest, in presence of the testator; it must be signed by the testator, if he knows how or is able to sign, and by the witnesses or at least by two of them, in case the others know not how to sign, and those of the witnesses who do not know how to sign, must affix their mark.

This testament is subject to no other formality than those prescribed by this and the preceding article.

APPENDIX "C"

Code of Civil Procedure of Louisiana Article 681. Real and actual interest required.

Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts.

APPENDIX "D"

Code of Civil Procedure of Louisiana Article 934. Effect of sustaining peremptory exception.

When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection cannot be so removed, or if plaintiff fails to comply with the order to amend, the action shall be dismissed.